No. 6883

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES E. DYER, Administrator of the Estate of OMEY E. DYER, Deceased, and CHARLES E. DYER, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

16

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

HON. CHARLES C. CAVANAH, *District Judge*

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STATEMENT OF THE CASE

Omey E. Dyer, the veteran whose insurance is involved in this case worked as much as he could and died. But all the work he did was against the advice of his physicians. (Ts. 86).

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that one who following the advice of his physician refrains from such work, and lives, is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a determination upon the facts in each case whether the man was able to continuously pursue a substantially gainful occupation."

Carter v. U. S., 49 Fed. (2d) 221.

In this case, Omey E. Dyer died on May 1, 1929 (Ts. 26).

Although a timely demand was made therefor, the defendant refused to produce the veteran's service and hospital record at the trial (Ts. 26).

The defendant rested without introducing any evidence (Ts. 25).

The court directed a verdict for the appellee and defendant upon the ground that there was no evidence at all upon which to predicate a verdict of the jury (Ts. 97).

The action was based upon a war risk insurance policy issued to Omey E. Dyer, deceased (Ts. 11-15). It was stipulated at the time of the trial that Omey E. Dyer entered the United States Army upon August 5, 1918, and was honorably discharged therefrom upon the 25th day of April, 1919, and that on August 8, 1918, he applied for and received a policy of insurance in the amount of $10,000.00, payable in monthly installments. That the policy was in force by virtue of the actual payment of premiums and including the grace period to midnight of May 31, 1919, and that Omey E. Dyer, the veteran, died May 1, 1929, and that the plaintiff in this action, Charles E. Dyer, was the beneficiary named in Omey E. Dyer's policy of war risk insurance (Ts. 26). The appointment of Charles E. Dyer as administrator of the estate of Omey E. Dyer was duly established (Ts. 27). The residence of the plaintiff in the District of Idaho was duly

established (Ts. 27) and the only issue in the case was whether Omey E. Dyer became totally and permanently disabled prior to midnight of May 31, 1919. The physical disabilities charged in the complaint as resulting in Omey Dyer's total and permanent disability were that while in France in 1918 he was crushed in and about the abdomen by a truck and contracted hernia, adhesions, hypochlorhydria, ileo caecal stasis, gastro-enteroptosis, pharyngitis, and nervousness. (Ts. 13). Omey E. Dyer, after his enlistment, was transported to France and was seen there by the witness, John A. Gardner (Ts. 35).

In addition to the lay witnesses, two doctors were called as witnesses on behalf of the plaintiff and these doctors had treated Omey E. Dyer during his lifetime, and the relation of physician and patient existed between them and Omey E. Dyer, and Dr. Hampton testified that at the time of his treatment of Mr. Dyer in July, 1919, Mr. Omey E. Dyer gave to Dr. Hampton a history of being injured in France, being run over through the stomach by a truck (Ts. 69). Later in 1926 Omey E. Dyer was treated for his physical condition by Dr. Warren C. Hunt (Ts. 26) and at that time Omey E. Dyer gave Dr. Hunt a history of his trouble and his history was that of a long standing nervous disability and dating from his war service, wherein he had been injured in that service. That his back and chest had been injured (Ts. 62).

That in February, 1919, Omey E. Dyer came back to the hospital at Ft. Douglas, Utah, with a number of convalescents, and the witness, George Thompson, saw him

in bed at the hospital at Ft. Douglas, and at that time Dyer "couldn't hardly move." That Omey E. Dyer stayed in the hospital at Ft. Douglas from February until his discharge from the army in April, 1919. That the witness, George Thompson, who was a sergeant in the Medical Corps on duty in the hospital at Camp Douglas, Utah, testified as follows:

> "I saw him occasionally and I noticed that his face was all drawn, he was stooped, and he had to go part of the time with crutches. Then towards the last he went with a cane. He complained of his stomach all the time he was there. I saw him about a week before he was discharged from the army and he was using a cane." (Ts. 45).

This was at a time long before the policy of insurance lapsed and was in February, March and April, 1919, and the policy did not lapse until May 31st, 1919.

The witness, A. T. Springer, saw Omey E. Dyer after his return from the army; saw him the day he got off the train; that was the day that he got back from the army (Ts. 30). He was either on crutches or had a cane. He was much lighter in weight than he was when the witness saw him before he went into the army, his complexion was bad and he looked like a sick man. That Omey E. Dyer stayed around Blackfoot where this witness observed him for two or three years, and he was pale and at different times he complained of his stomach; he never regained his weight. That the veteran had a breaking out at times around his mouth—sores—he complained of his stomach continually whenever the witness saw him.

At one time the witness saw him down on his father's ranch, and Omey E. Dyer attempted to saw a board in two; that he had to stop two or three times during the time he was sawing it, due to weakness and coughing (Ts. 31).

Omey E. Dyer returned to his father's farm at Blackfoot, Idaho, in May, 1919, and his father testified that upon his return he helped around and wasn't able to go on (a motion to strike the latter part was sustained). (Ts. 27-28).

The witness, Owen J. Jones, testified that he saw Omey E. Dyer a few days after he came back from the army, and testified that Omey E. Dyer stooped a little, he was pale and he looked like he was sick (Ts. 33). He moved with a limp, favored his side and was short of breath, and that the witness went out working with him in June, 1919, pitching hay. The witness stated:

> "I was working with him pitching hay when he quit, gave out, he couldn't go on. That was in June after he came back from the army. He started to work in the morning and he lasted about an hour and a half or two hours and quit pitching hay. There was a hay crew out there pitching hay. I was pitching hay on one side of the wagon and he was pitching hay on the other side. He went home, quit." (Ts. 33).

When he came back from the army he had a cane. He used a cane off and on after that, and he used the cane from the time he came out of the army until he went on the highway. (Ts. 34).

The witness, Albert Hoeffer, knew Omey E. Dyer before the war and knew him when he came back from the army in the spring of 1919, and at that time when he saw Omey E. Dyer, he was sick and could hardly walk around. He favored his side and was pale, weak, and used a cane. (Ts. 52).

The witness, Wesley C. Thompson, testified that he saw Omey E. Dyer in the fore part of May, 1919, on his father's ranch and testified as follows:

> "I noticed that he was drawn over and he walked with a cane and complained quite a bit about his stomach. He worked under me. He went to work for me on the 14th of July, 1919. I was bridge foreman and Omey Dyer was a form builder. He was the boss of the form builders. I would say he worked under me about half a month before he took sick. He went to work on the 14th and took sick on the 28th. He worked 14 days. I took him to Dr. Hampton. Dr. Hampton was at Blackfoot. Then he worked off and on some through August. I couldn't give you the exact date." (Ts. 46-47).

The witness further testified:

> "When he took sick, he simply turned pale. He would first get some sores around his mouth, and inside his mouth, and then he would commence vomiting and he would vomit everything out that was in him; then he would get down on his hands and knees and he would vomit up slime and awful looking stuff. * * * Sometimes he would get over it and the next morning he would go back to work, but I would say that he took sick as much as three times before I took him to a doctor. I think the third time I took him to a doctor." (Ts. 47).

Dr. J. O. Hampton, a physician and surgeon by profession, and whose qualifications are admitted by the defendant, testified that the first time he saw Omey E. Dyer professionally was the 28th day of July, 1919. That Omey E. Dyer came to the Doctor's office as a patient for examination and treatment. The relationship of physician and patient existed between the Doctor and Omey E. Dyer. That he saw him quite often off and on during 1919 and quite often after that up until about 1921 (Ts. 69). That at the time of Dr. Hampton's treatment he took the history hereinbefore referred to, and on July 28, 1919, when he came to the Doctor's office, Omey E. Dyer was weak and in a debilitated condition, very anemic and very thin, and he walked in a stooped position, complaining of a good deal of pain in the stomach and epigastric region and back. He vomited, you might say, incessantly. Everything he ate at that time he vomited, couldn't retain anything on his stomach (Ts. 70). The Doctor made a physical examination, went over him as carefully as he could and found that he had a gastroptosis, a dropping down of the stomach and intestines. This caused poor digestion; in fact there wasn't any. The food just lays there and doesn't digest, it gets sour and putrid. That there was no peristaltic action to speak of, and after a while the food gets sour and is ejected from the stomach, vomited up (Ts. 70-71). And the Doctor further testified:

> "Q. And would being run over by a truck, in your opinion, as he gave you in his history, be sufficient to cause that condition?

A. Yes.

Q. In your opinion did it cause it?

A. Yes." (Ts. 71).

Dr. Hampton further testified that Omey E. Dyer was totally and permanently disabled when he saw him in 1919. Dr. Hampton again treated Omey E. Dyer in 1927 and 1928 and considered him totally and permanently disabled during the time he treated him in 1927 and 1928, and in the Doctor's opinion the injury by the truck suffered by Omey E. Dyer while in the military service and while the policy was in force was the cause of his condition in 1927 and 1928. On a history of the case given to Dr. Hampton, Dr. Hampton testified that Omey E. Dyer was totally and permanently disabled within the definition used at the time of his discharge from the United States Army on the 25th day of April, 1919 (Ts. 72-82). Dr. Hampton further testified that the cause of his total and permanent disability, according to the history that the patient had given him, was being crushed by a truck (Ts. 82) and that the Doctor found, on giving him a thorough examination, evidences of an injury in that his stomach and intestines were low, down in the hypogastric region (Ts. 82), and that in the Doctor's opinion that condition was caused by some injury. It was more exaggerated than a common type of gastro-enteroptosis. (Ts. 82).

Dr. Hampton further testified, without any qualification, that the efforts of Omey E. Dyer to carry on the work made his condition worse, saying:

"If he tried work it made this condition worse. Any mental or physical work of any kind would aggravate the condition."

And that even walking and moving around would bring on the vomiting and pain (Ts. 83), and again the Doctor testified:

"I didn't think he should work at all." (Ts. 89).

On cross examination Doctor Hampton testified:

"Q. You knew during the time you were treating him that in fact he was working?

A. Yes; and I tried to keep him from it.

Q. But he continued to work did he?

A. Some of the time." (Ts. 86).

* * * *

"Q. What did you do for permanent relief?

A. I didn't consider there would be any permanent relief for that man's condition." (Ts. 85).

The witness, John A. Gardner, saw Omey E. Dyer after his return from the army in August, 1919 and was with him practically all the time from August 1919 until about a year before Dyer's death in 1929 (Ts. 39). His physical condition looked to be very poor at that time. He was pale and he limped when he walked; kind of pulled over to one side. He was lighter in weight after he was discharged from the army. He had a poor appetite and appeared to be exhausted (Ts. 35-36). He became tired easily upon exertion, and before the war he had engaged

in sports, but he didn't engage in sports after he got out of the army. At that time he appeared to be a sick man. His physical condition became increasingly worse and he wasn't able to work continuously. He would try to work and become sick, might drop helpless right where he was working. The witness was engaged in work with him and picked him up several times when he would drop right where he was working; was engaged in the contracting business with Omey E. Dyer, and was with Omey E. Dyer practically all the time from August, 1919, until about a year before Omey E. Dyer's death (Ts. 39), and during that time Omey E. Dyer would be down sick, unable to work, too sick to work (Ts. 37). Omey E. Dyer tried to use a pick and shovel, but couldn't do it—he was terribly nervous. He could not do the ordinary tasks that other men could easily perform, and that Omey E. Dyer was sick in bed about a year of the time after he returned from the war, not counting the last year (Ts. 37), and that Omey E. Dyer would have bad vomiting spells. He would have vomiting spells both before and after eating. He vomited blood. He never used alcohol or tobacco in any form, and that the witness saw him take a lot of medicine at various times. He walked with a limp and bent over to one side—the right side. (Ts. 38).

That the insured and John A. Gardner were brother-in-laws and that they worked as contractors from 1923 to 1927 (Ts. 39). That the firm made about $4,000.00 a year from 1923 to 1927, and Omey Dyer received 50%

of all that the firm made. This witness testified that if he had been in Omey E. Dyer's place, he would not have tried to work (Ts. 40). That many times Omey E. Dyer called his brother-in-law's attention to the fact that Omey E. Dyer was not keeping up his end of the work (Ts. 41), and that Omey E. Dyer did not exact half of the proceeds from the earnings of the partnership, because he felt like he hadn't earned it (Ts. 42).

The witness, Beulah Gardner, testified that she became acquainted with Omey E. Dyer in 1921 and knew him quite well after 1923. That the first time she saw him in 1921 he didn't look to be very strong, and he was nervous and pale and had a bad complexion. Sometimes his appetite was good and other times it wasn't good. That during the time that she knew him he worked not more than half the time if he worked that much. The witness saw him lots of times when he tried to work and couldn't (Ts. 54). That he was home sick in bed close to 18 months. He was in bed lots of times. The witness saw him taking medicine and saw him vomit and vomit blood, and even though he wasn't in a spell he would be so he couldn't hardly stand, he would shake so. He walked like an old man and seemed to be lame (Ts. 55).

The witness, C. A. Dunn, testified that Omey E. Dyer always had a limp and leaned over sideways, and that Omey E. Dyer was never in good health from the time that Mr. Dunn knew him; he complained of his stomach (Ts. 57). His face was drawn and he sometimes looked like a corpse. He never could stand very much physical

work. He wasn't on the work all the time, but his partner was, and it was on account of his partner that the contract was kept up (Ts. 58). He became tired easily upon exertion and he couldn't stand but just a little work (Ts. 58). He was off the job quite often. He was always sick; in fact he kept growing gradually worse after he went to work. He worked about half the time, possibly a little more or less (Ts. 58). Many, many times he was forced to leave the job and go home sick. He was continually complaining of his back and side (Ts. 59). That Omey E. Dyer gradually grew worse and worse. That the fact that John A. Gardner was his brother-in-law had a lot to do with Omey E. Dyer being a partner. Omey E. Dyer was never entirely holding his end up (Ts. 60).

Dr. Warren Coe Hunt, a witness for the plaintiff, testified that he had been licensed to practice medicine for 21 years and had practiced in Oregon for 21 years (Ts. 61). That the first time he treated Omey E. Dyer was February 20, 1926, and he treated him for several months subsequent to that time. That he at that time gave a history of a long standing nervous disability, dating from his injury while in the service. That the immediate difficulty for which he came to the Doctor for treatment was nervous unrest, and the Doctor found difficulty with Omey Dyer's gums, phorrhea, and a general nervous debility, and later operated upon him for appendicitis (Ts. 62), and his internal difficulty may have been occasioned by the injury in 1918. That Omey E. Dyer was pale, anemic and weak and highly nervous, and that he was

also suffering from hyperacidity and chronic indigestion, and the Doctor at that time found extensive intestinal adhesions (Ts. 62). The condition of bowel stasis induced by adhesions brought about by the result of internal injury may well have brought about a predisposition to appendicitis (Ts. 63). That during the time that he knew him Omey E. Dyer was able to work continuously very little of the time owing to his weakness and general debility. That his stooping was caused by debility, weakness, pain in his back and abdomen and a general condition of exhaustion. That Omey E. Dyer was undernourished, thin, anemic and weak (Ts. 63). This Doctor further testified that he never saw Mr. Dyer when he was capable of any sustained effort, either mental or physical, on account of his general physical weakness as evidenced by anemia, accompanied by rapid, weak pulse. His condition improved, but not sufficient to permit his return to any useful work (Ts. 67), and that he should never have followed hard manual labor (Ts. 67).

In 1927 Mr. Dyer returned to his father's home at Blackfoot, Idaho, where he remained until he went to the Veterans' Hospital at Boise, Idaho, where he died on May 1, 1929 (Ts. 31). At that time he was weak, short of breath and had to sit down and rest. He would be very short of breath after he walked 200 or 300 yards (Ts. 31). This condition continued until he left Blackfoot. He remained at Blackfoot a year and four or five months before he went to the Veterans' Hospital in 1928. He was sick during that time, and the witness Albert Hoeffer testified:

"I saw him when he came back from Oregon in 1927 or 1928. I noticed at that time that he was exactly as he was when he first came back from the army, only more serious. I saw him try to work in the winter of 1927, I guess it was. I don't remember exactly. He came to my place to get a load of hay with his father. They were loading my hay and I was doing some of the chores, and I happened to look around and Omey Dyer was laying on the hay stack pale. I asked him what was the matter. He said, 'I can't work.' * * * I offered to help him and he laid on the stack until I finished helping load the load. I remember the occasion when he was hauling some fertilizer after he came back from the army. He had to stop and rest. He just couldn't make it. He would work a little while and then he would have to stop, and there was another occasion. This time he was loading hay and he vomited. I also noticed the sores around his mouth." (Ts. 52-53).

In 1927 and 1928, until he went to the Veterans' Hospital, he was again attended by Dr. J. O. Hampton, who testified that during that time Omey E. Dyer was totally and permanently disabled, and his condition was the same as he had found on July 28, 1919, only aggravated worse (Ts. 72).

SPECIFICATIONS OF ERROR

We believe that we can clearly and understandingly state our position by making specifications of the points upon which we rely and under each specification refer to the assignments of errors pertaining thereto and by which the point is raised.

SPECIFICATION NO. 1

THAT THE COURT ERRED IN RULING AND HOLDING THAT THE PLAINTIFF HAD NOT MADE A CASE FOR THE JURY AND IN DIRECTING A VERDICT FOR THE DEFENDANT.

FIRST ASSIGNMENT

That the trial court erred in ruling that the defendant was entitled to a directed verdict in its favor and in directing a verdict in its favor. (Ts. 101).

SECOND ASSIGNMENT

That the trial court erred in instructing the jury as follows:

> "Gentlemen of the jury, in the view I have taken of the law of this case, I feel compelled to find—to instruct you to find a verdict for the defendant. * * My analysis of the testimony in this case is that the plaintiff has not shown that he in fact became totally and permanently disabled between the date of the issuance of the policy until the time it lapsed, as required by the policy and the law; that there is no evidence, as I view it, at all upon which to predicate a verdict of the jury or a decree of the court. You may go into your jury room and I will send in a form of verdict, which will be in favor of the defendant." (Ts. 101-102).

THIRD ASSIGNMENT

That the trial court erred in receiving and filing the verdict. (Ts. 103).

SPECIFICATION NO. 2

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE WITNESSES, BEULAH E. GARDNER, JOHN A. GARDNER, A. T. SPRINGER AND CHARLES E. DYER, TO ANSWER QUESTIONS AS TO THE PHYSICAL APPEARANCE AND CONDITION OF OMEY E. DYER.

FOURTH ASSIGNMENT

That the trial court erred in sustaining the motion to strike part of the testimony of Charles E. Dyer, the father of Omey E. Dyer, and in ruling as follows:

"Q. Did he work?

A. He helped around with me. He wasn't able to go on.

MR. GRIFFIN: Just a minute. I move to strike 'He wasn't able to go on' as a conclusion.

THE COURT: It may be stricken." (Ts. 103).

FIFTH ASSIGNMENT

That the trial court erred in ruling and holding that part of the testimony of the witness, A. T. Springer, should be stricken, when the following proceedings were had:

"Q. (By attorney for the plaintiff.) Now tell us the facts, Mr. Springer, what you observed about Omey E. Dyer at that time. Don't state any conclusions.

A. He was either on crutches or had a cane, I don't remember which to the best of my recollection. He was much lighter in weight than he was when I saw him before he went to the army, his complexion was bad, and he looked like a sick man.

MR. GRIFFIN: I move to strike 'he looked like a sick man' as a conclusion of the witness.

THE COURT: It may be stricken.

MR. GRIFFIN: And the jury be instructed not to regard it.

THE COURT: The jury understands that when any testimony is stricken by the Court they are not to consider it." (Ts. 103).

SIXTH ASSIGNMENT

That the trial court erred in sustaining the objection to the testimony of the witness, John A. Gardner:

"Q. What was his color, was it healthful, or otherwise, after he got out of the army?

MR. RYDALCH: Object to the question as a conclusion.

THE COURT: Sustained." (Ts. 104).

SEVENTH ASSIGNMENT

That the trial court erred in sustaining the objection of the defendant to the testimony of Beulah E. Gardner as to the appearance of Omey E. Dyer, in the following particulars:

"Q. Did he appear to be a sick man or a well man?

MR. RYDALCH: Object to that question as leading, and furthermore as conclusion of the witness. She could state how he appeared to her.

THE COURT: Sustained." (Ts. 104).

POINTS AND AUTHORITIES
SPECIFICATION NO. 1

THAT THE COURT ERRED IN RULING AND HOLDING THAT THE PLAINTIFF HAD NOT MADE A CASE FOR THE JURY AND IN DIRECTING A VERDICT FOR THE DEFENDANT.

PROPOSITION OF LAW NO. 1

SINCE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLANT'S VIEW OF THE CASE THE COURT SHOULD HAVE ALLOWED THE CASE TO GO TO THE JURY.

U. S. v. Lesher, decided May 31, 1932, ——Fed. (2d—

U. S. v. Scarborough, 57 Fed. (2d) 137.

Sorvik v. U. S., 52 Fed. (2d) 406.

Hayden v. U. S., 41 Fed. (2d) 614.

Mulivrana v. U. S., 41 Fed. (2d) 734.

U. S. v. Burke, 50 Fed. (2d) 653.

U. S. v. Lawson, 50 Fed. (2d) 646.

U. S. v. Meserve, 44 Fed. (2d) 549.

U. S. v. Scarborough, 57 Fed. (2d) 137.

U. S. v. Rasar, 45 Fed. (2d) 545.

U. S. v. Riley, 48 Fed. (2d) 203.

Corsicana National Bank of Corsicana v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, 64 L. Ed. 141.

Smith-Booth-Usher Co. v. Detroit Copper Mining Co. of Arizona, 220 Fed. 600 (C. C. A. 9th).

United States Fidelity & Guaranty Co. v. Blake, 285 Fed. 449 (C. C. A. 9th).

Alaska Fish Salting & By-Products Co. v. McMillan, 266, Fed. 26 (C. C. A. 9th).

Madray v. United States, 55 Fed. (2d) 552.

U. S. v. Gower, 50 Fed. (2d) 370 (C. C. A. 10).

Ford v. U. S., 44 Fed. (2d) 754 (C. C. A. 1).

Carter v. U. S., 49 Fed. (2d) 221 (C. C. A. 4).

Kelley v. U. S., 49 Fed. (2d) 897 (C. C. A. 1).

U. S. v. Tyrakowski, 50 Fed. (2d) 766 (C. C. A. 7).

Malavski v. U. S., 43 Fed. (2d) 974 (C. C. A. 7).

U. S. v. Godfrey, 47 Fed. (2d) 126 (C. C. A. 1).

U. S. v. Phillips, 44 Fed. (2d) 689 (C. C. A. 8).

U. S. v. Cox, 24 Fed. (2d) 944 (C. C. A. 5).

U. S. v. Acker, 35 Fed. (2d) 646 (C. C. A. 5).

A.

A REVIEW OF THE EVIDENCE DISCLOSES THAT IT IS AMPLY SUFFICIENT NOT ONLY TO SUPPORT A VERDICT, BUT TO BRING CONVICTION THAT THE PLAINTIFF SHOULD HAVE RECOVERED.

U. S. v. Lesher, decided May 31, 1932.

U. S. v. Burke, 50 Fed. (2d) 653.
U. S. v. Lawson, 50 Fed. (2d) 646.
U. S. v. Scarborough, 57 Fed. (2d) 137.
Sorvik v. U. S., 52 Fed. (2d) 406.
McNally v. U. S., (C. C. A. 8) 52 Fed. (2d) 440.

B.

WHERE A VETERAN WORKS AND SUCH WORK IS INJURIOUS TO HIM, HE IS NOT BARRED FROM RECOVERING UPON HIS WAR RISK INSURANCE.

U. S. v. Sligh, 31 Fed. (2d) 735.
U. S. v. Meserve, 44 Fed. (2d) 549.
U. S. v. Acker, 35 Fed. (2d) 646.
U. S. v. Lawson, 50 Fed. (2d) 646.
Carter v. U. S., 49 Fed. (2d) 221.
U. S. v. Godfrey, 47 Fed. (2d) 126.

SPECIFICATION NO. 2

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE WITNESSES, BEULAH E. GARDNER, JOHN A. GARDNER, A. T. SPRINGER AND CHARLES E. DYER TO ANSWER QUESTIONS AS TO THE PHYSICAL APPEARANCE AND CONDITION OF OMEY E. DYER.

PROPOSITION OF LAW NO. 2

IN A CASE INVOLVING HEALTH, NON-EXPERT WITNESSES WHO HAVE HAD OPPOR-

TUNITY TO OBSERVE, ARE PERMITTED TO GIVE SHORT HAND DESCRIPTIONS OF PHYSICAL APPEARANCE AND CONDITION.

U. S. v. Woltman, decided February 29, 1932, by the Court of Appeals, District of Columbia.

Baltimore & Ohio Railroad Company v. Rambo, 59 Fed. 75.

Parker et al. v. Elgin, 5 Fed. (2d) 562.

Connecticut Mutual Life Insurance Company v. Lathrop. 111 U. S. 612, 28 L. Ed. 536.

Mutual Life Insurance Company of New York v. Leubrie, 71 Fed. 843.

Kiesel & Co. v. Sun Insurance Office of London, 88 Fed. 243.

Firemen's Insurance Company of Baltimore v. J. H. Mohlman Co., 91 Fed. 85.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1252, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Note 17, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1267, page 2335.

Greenleaf on Evidence, Vol. 1, 16th Edition, page 524.

Turner v. American Security & Trust Company, 213 U. S. 257; 53 L. Ed. 788.

Reininghaus v. Merchants' Life Association, (Iowa), 89 N. W. 1113.

Looney v. Parker (Iowa) 230 N. W. 570.

Lilly v. Kansas City Rys. Co., (Mo. App.) 209 S. W. 969.

Benson v. Smith (Mo. App.) 38 S. W. (2d) 749.

San Antonio Traction Co. v. Flory (Tex. Civ. App.) 100 S. W. 200.

Missouri, K. & T. Ry. Co. v. Gilcrease, (Tex. Civ. App.) 187 S. W. 714.

Mielke v. Dobrydnio (Mass.) 138 N. E. 561.

Tyler v. Moore (Ore.) 226 Pac. 443.

ARGUMENT

SPECIFICATION NO. 1

THAT THE COURT ERRED IN RULING AND HOLDING THAT THE PLAINTIFF HAD NOT MADE A CASE FOR THE JURY AND IN DIRECTING A VERDICT FOR THE DEFENDANT.

In this part of our brief, we will discuss our first specification, the essential point of which is that at the close of appellant's evidence, and after the defendant had rested without introducing any evidence, the court took the case from the jury and directed a verdict in favor of the appellee.

PROPOSITION OF LAW NO. 1

SINCE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLANT'S VIEW OF THE CASE THE COURT SHOULD HAVE ALLOWED THE CASE TO GO TO THE JURY.

We now desire to discuss the first, second and third assignments of error. This Court has rendered so many

recent decisions laying down the rule that if there is any substantial evidence in a case that it must be submitted to a jury, that we hesitate to cite any cases on this point.

As recently as May 31, 1932, this Court in *U. S. v. Lesher* (——Fed. (2d) ——) stated:

> "Under the seventh amendment to the Constitution, a jury trial is guaranteed in a civil action; and that it is error to direct a verdict for the defendant if there is any substantial evidence is *stare decisis.*"

As was said by this Court in a case that we deem to be very similar to the case at bar, *U. S. v. Scarborough,* 57 Fed. (2d) 137:

> "From a consideration of the testimony, both lay and medical, we cannot say there is no substantial evidence to sustain the findings and conclusions of the trial court."

In the Sorvik case this Court reversed the trial judge for directing a verdict in a war risk insurance case and said:

> "The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge; it is 'whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.' *United States Fidelity & Guaranty Co. v. Blake* (C. C. A. 9), 285 F. 449, 452, and cases there cited; and *United States v. Burke,* 50 F .(2d) 653, decided by this court June 1, 1931 and cases there cited.
>
> "And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff,

> we must bear in mind the remedial purposes of the World War Veterans' Act (38 U. S. C. A. 421 *et seq.*) which the courts have repeatedly held should be liberally construed in favor of the veterans. *United States v. Eliasson* (C. C. A. 9), 20 F. (2d) 821, 824; *United States v. Sligh* (C.C.A. 9) 735, 736, *certiorari* denied, 280 U.S. 559, 50 S. Ct. 18, 74 L. Ed. 614; *United States v. Phillips* (C.C.A. 8) 44 F. (2d) 689, 692; *Glazow v. United States* (C. C. A. 2), 50 F. (2d) 178."

Sorvik v. U. S., 52 Fed. (2d) 406.

And in the case of Hayden v. U. S., this Court reversed the trial judge for granting a nonsuit, 41 Fed. (2d) 614, and this Court also reversed the trial judge for granting a motion for nonsuit in *Mulivrana v. U. S.,* 41 Fed. (2d) 734. The rule on this subject is very clearly expressed by this Court in *U. S. v. Burke,* 50 Fed. (2d) 653:

> "At the end of the entire testimony, the defendant made a motion for a directed verdict in its favor on the ground that the evidence was not sufficient to establish a *prima facie* case. The question is whether the evidence tending to establish total and permanent disability while the policy was in effect, was sufficient to take the case to the jury. We do not weigh the evidence but inquire merely whether there was sufficient evidence to sustain the verdict and judgment."

And on page 656, Judge Sawtelle further says:

> "Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit court has been definitely settled and almost universally observed. Judge Gilbert, for

many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:

" 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

" 'And on a motion for a directed verdict the court may not weight the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. *Travlers' Ins. Co. v. Randolph,* 78 F. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery,* 74 F. 463, 20 C. C. A. 596; *Rochford v. Pennsylvania Co.,* 174 F. 81, 98 C. C. A. 105; *United States Fidelity & Guaranty Co. v. Blum* (C. C. A.) 270 F. 946; *Smith-Booth-Usher Co. v. Detroit Copper Mining Co.,* 220 F. 600, 136 C. C. A. 58. In the case last cited this court said:

" ' "The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in oppositions thereto." *United States Fidelity & Guaranty Co. v. Blake* (C. C. A.) 285 F. 449, 452.'

"Again 'such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict.' *Marathon Lumber Co. v. Dennis,* 296 F. 471 (C. C. A. 5).

"See also the following recent decisions of this court: *U. S. v. Barker* (C. C. A.), 36 F. (2d) 556; *U. S. v. Meserve* (C. C. A.), 44 F. (2d) 549; *U. S. v. Rice* (C. C. A.), 47 F. (2d) 749; *U. S. v. Stamey,* (C. C. A.) 48 F. (2d) 150; *U. S. v. Lawson,* (C. C. A.), 50 F. (2d) 646."

U. S. v. Burke, 50 Fed. (2d) 653.

And this Court has held that there was sufficient evidence to go to a jury in the following war risk insurance cases:

U. S. v. Lawson, 50 Fed. (2d) 646.

U. S. v. Meserve, 44 Fed. (2d) 549.

U. S. v. Scarborough, 57 Fed. (2d) 137.

U. S. v. Lesher, opinion filed May 31, 1932, ——Fed. (2d) ——.

U. S. v. Rasar, 45 Fed. (2d) 545.

U. S. v. Riley, 48 Fed. (2d) 203.

The United States Supreme Court has said:

"So far as the above-recited facts were in dispute, there was substantial evidence tending to support a view of them favorable to plaintiff's contentions. What weight should be given to it was for the jury, not the court, to determine. *Hepburn v. Dubois,* 12 Pet. 345, 376, 9 L. Ed. 1111, 1123; *Lancaster v. Collins,* 115 U.S. 222, 225, 29 L. Ed. 373, 374, 6 Sup. Ct. Rep. 33; *Chicago & N. W. R. Co. v. Ohle,* 117 U. S. 123, 129, 29 L. Ed. 837, 839, 6 Sup. Ct. Rep. 632;

Aetna L. Ins. Co. v. Ward, 140 U. S. 76, 91, 35 L. Ed. 371, 376, 11 Sup. Ct. Rep. 720; *Troxel v. Delaware, L. & W. R. Co.,* 227 U. S. 434, 444, 57 L. Ed. 586, 591, 33 Sup. Ct. Rep. 274."

Corsicana National Bank of Corsicana v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, 64 L. Ed. 141.

This court has said:

"The right to a jury trial is guaranteed by the Constitution, and it is not to be denied except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. Tested by these rules and on a careful consideration of the evidence in the case at bar, we are of the opinion that the cause should have been submitted to the jury."

Smith-Booth-Usher Co. v. Detroit Copper Mining Co. of Arizona, 220 Fed. 600. (C. C. A., Ninth Circuit).

"Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

"And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are estab-

lished even if their verdict be against the decided preponderance of the evidence. *Travelers' Ins. Co. v. Randolph,* 78 Fed. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery,* 74 Fed. 463, 20 C. C. A. 596; *Rochford v. Pennsylvania Co.,* 174 Fed. 81, 98 C. C. A. 105; *United States Fidelity & Guaranty Co. v. Blum* (C. C. A.) 270 Fed. 946; *Smith-Booth-Usher Co. v. Detroit Copper Mining Co.,* 220 Fed. 600, 136 C. C. A. 58. In the case last cited this court said:

" 'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon this issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto.' "

United States Fidelity & Guaranty Co. v. Blake, 285 Fed. 449 (C. C. A., Ninth Circuit).

"In order to warrant a directed verdict, the case on the testimony must be clear and indisputable, and about which there could reasonably be but one opinion. *Lincoln v. Power,* 151 U. S. 436, 439, 14 Sup. Ct. 387, 38 L. Ed. 224. See, further, as to a directed verdict, *Huber v. Miller,* 41 Or. 103, 68 Pac. 400, and *Stager v. Troy Laundry Co.,* 41 Or. 141, 68 Pac. 405. From the foregoing, we are led to the conclusion that a directed verdict was properly denied."

Alaska Fish Salting & By-Products Co. v. McMillan, 266, Fed. 26 (C. C. A., Ninth Circuit).

In a very recent case, the Circuit Court of Appeals for the Fourth Circuit, had a case before it in which there

was no medical testimony whatever offered. The trial judge directed a verdict in favor of the defendant, and the Circuit Court reversed the case saying:

> "In considering whether a trial judge has erred in directing a verdict, we must apply the firmly established rule that the evidence must be regarded in its aspect most favorable to the opposing party; that the weight of the testimony is always for the jury to determine, and that therefore, a trial judge should not direct a verdict unless the evidence is so conclusive that were a verdict rendered for the opposing party, the court, in the exercise of a sound judicial discretion, would be compelled to set it aside. *Norris v. N. Y. Life Insurance Co.* (C. C. A. 49 F. (2d) 62; *South Carolina Asparagus Growers' Association v. Southern Ry. Co.* (C. C. A.) 46 F. (2d) 452; *Will Edwards v. U. S.* (C. C. A.) 53 F. (2d) 622. * * * *.
>
> "We therefore feel that these facts, viewed as they must be in the light most favorable to the appellant, required submission to the jury of the question of the character and extent of appellant's disability, and that therefore the trial judge erred in withdrawing the case from the jury and in directing a verdict in the government's favor."

Madray v. United States, 55 Fed. (2d) 552.

For other war risk insurance cases holding that the facts presented a case for the jury, see:

U. S. v. Gower, 50 Fed. (2d) 370 (C. C. A. 10).
Ford v. U. S., 44 Fed. (2d) 754 (C. C. A. 1).
Carter v. U. S., 49 Fed. (2d) 221 (C. C. A. 4).
Kelley v. U. S., 49 Fed. (2d) 897 (C. C. A. 1).
U. S. v. Tyrakowski, 50 Fed. (2d) 766 (C. C. A. 7).

Malavski v. U. S., 43 Fed. (2d) 974 (C. C. A. 7).
U. S. v. Godfrey, 47 Fed. (2d) 126 (C. C. A. 1).
U. S. v. Phillips, 44 Fed. (2d) 689 (C. C. A. 8).
U. S. v. Cox, 24 Fed. (2d) 944 (C. C. A. 5).
U. S. v. Acker, 35 Fed. (2d) 646 (C. C. A. 5).

A.

A REVIEW OF THE EVIDENCE DISCLOSES THAT IT IS AMPLY SUFFICIENT NOT ONLY TO SUPPORT A VERDICT, BUT TO BRING CONVICTION THAT THE PLAINTIFF SHOULD HAVE RECOVERED.

The trial court in directing the jury to render a verdict for defendant, stated:

> "That there is no evidence, as I view it, at all on which to predicate a verdict of the jury or a decree of the court." (Ts. 102).

It will be remembered that in this case the defendant introduced no evidence of any kind or character (Ts. 95), and it will be further remembered that although the plaintiff in this case on February 20, 1932, demanded that the defendant produce all of the records in possession of the defendant, and that the defendant failed and refused to produce the service record of Omey E. Dyer, that is, his hospital record while in the military service. (Ts. 26).

We are confident that an analysis of the testimony in this record discloses not only sufficient evidence to support a verdict or judgment, but to bring conviction that

the verdict and judgment should have been for the plaintiff.

A summary of the evidence, which is undisputed and uncontradicted, is as follows:

The deceased veteran, Omey E. Dyer, was accepted for military service by the defendant on August 5, 1918, (Ts. 26), and at that time he was about the age of 25 years (Ts. 34-35). He received his insurance certificate on August 8, 1918. (Ts. 26). This insurance was in force by reason of the actual payment of premiums until the 31st day of May, 1919. (Ts. 26). Omey E. Dyer, the insured, died May 1, 1929. (Ts. 26). After Omey E. Dyer's enlistment, he was transported to France, where he was seen by one witness in November, 1918. (Ts. 38). At that time he weighed 150 lbs. (Ts. 39).

In July 1919, Omey E. Dyer, while consulting his physician told him that he had been run over through the region of the stomach by a truck while in France. (Ts. 69). Omey E. Dyer gave the same history to his physician, Dr. Hunt, in 1926. (Ts. 62).

In February 1919, which was several months before his policy lapsed, Omey E. Dyer came back to Fort Douglas, Utah, along with other convalescing soldiers, and he was in bed in the hospital at Fort Douglas, and at that time Omey E. Dyer "couldn't hardly move." He stayed in the hospital at Fort Douglas from February until his discharge on April 25, 1919 (Ts. 45), and at that time his face was all drawn, he was stooped and had to go part of

the time on crutches. He then went with a cane. He complained of his stomach all the time he was there. (Ts. 45). The day he got off the train on coming from the army, he was either on crutches or had a cane. He was much lighter in weight than before he went to the army. (Ts. 30). His complexion was bad and he looked like a sick man. He never regained his weight. (Ts. 30).

He returned to his father's home at Blackfoot, Idaho, in May, 1919, while his policy was still in force, and he helped around and wasn't able to go on. He stayed on his father's place about three months. Another witness saw him a few days after he came back from the army and Omey E. Dyer stooped a little, he was pale, and he looked like he was weak. (Ts. 33). He moved with a limp, favored his side, and was short of breath. In June 1919, this witness saw him try to pitch hay and he couldn't go on. He lasted about 1½ or 2 hours at this work (Ts. 33). When he came back from the army, he had a cane. He used the cane on and off after that. Another witness testified that when Omey Dyer came home from the army, he was sick and could hardly walk around. He favored his side, was pale, weak, and used a cane. (Ts. 52).

On July 14, 1919, he went to work as a form builder. He worked 14 days and was taken to Dr. Hampton. (Ts. 46-47). He was sick and vomited. He had three of these vomiting spells before he went to Dr. Hampton. (Ts. 47).

On July 28, 1919, less than two months from the time his policy lapsed, he became a patient of Dr. J. O. Hampton and remained Dr. Hampton's patient at that time up until about 1921. (Ts. 69). When he came to Dr. Hampton's office, he was weak and debilitated, very anemic, very thin, and walked in a stooped position, complaining of pain in the stomach and epigastric region and back. He vomited incessantly. Everything he ate he vomited, could retain nothing on his stomach (Ts. 70). The Doctor found that he had a gastroptosis, a dropping down of the stomach and intestines which destroyed digestion. The food lay there and got sour and putrid. There was no peristaltic action. (Ts. 70). In the Doctor's opinion, his being run over by a truck was sufficient to cause that condition. (Ts. 71). That in the Doctor's opinion, he was totally and permanently disabled on July 28, 1919 on account of the condition above described. (Ts. 71). Dr. Hampton tried to keep him from working. (Ts. 86). That in the Doctor's opinion, Omey E. Dyer should not have worked at all. (Ts. 89). *That any mental or physical work of any kind would aggravate Omey E. Dyer's condition.* That even walking and moving around would bring on the vomiting and pain. (Ts. 83). And that in the Doctor's opinion, there would not be any permanent relief for the man's condition. (Ts. 85). *That Omey E. Dyer was totally and permanently disabled at the time of his discharge from the United States Army on the 25th day of April, 1919.* (Ts. 72-83). While he was taking treatment from Dr. Hampton, he was also work-

ing with or under Wesley C. Thompson except for five months when he was up in Bonneville County, and during that five months he came down sick and stayed at Thompson's place 3 or 4 days. (Ts. 48). He was pale and weak and had vomiting and gagging spells. Between 1919 and April of 1921, he was off work one-fourth of the time with this sickness. He had 20 or 25 spells between 1919 and 1921. (Ts. 48). He would get vomiting spells when he was only off 4 or 5 hours. Then other times Mr. Thompson would send him home. (Ts. 49). In August 1919 when seen by the witness John A. Gardner, Omey E. Dyer's physical condition looked to be very poor. He was pale and he limped when he walked, kind of pulled over to one side. (Ts. 35). He had a poor appetite and appeared to be exhausted. (Ts. 36). He became tired easily upon exertion and appeared to be a sick man. His physical condition became increasingly worse. He wasn't able to work continuously. He might drop helpless right where he was working. He was picked up several times by this witness when he dropped right where he was working. (Ts. 36). From 1921 until 1928 he attempted to engage in contract business with his brother-in-law, John A. Gardner, who was with him practically all the time from August 1919 until Omey E. Dyer went to the Veterans' Hospital where he died in 1929 (Ts. 39).

During that entire time, Omey E. Dyer would be down sick, unable to work, too sick to work. (Ts. 37). That he was actually sick in bed about a year after he returned

from the army, not counting the last year. (Ts. 37). During that time he had bad vomiting spells. He vomited blood. (Ts. 38). From 1923 to 1927, the firm of Gardner & Dyer made about $4,000 a year and Omey E. Dyer received 50% of all the firm made. (Ts. 40). But his partner testified that if he had been in Omey Dyer's place he would not have tried to work; that many times Omey Dyer called his partner's attention to the fact that he (Dyer) was not keeping up his end of the work; that he did not exact half of the proceeds from the earnings of the partnership because he felt that he didn't earn it. (Ts. 42).

That in 1921 he did not look to Beulah Gardner to be very strong. He was nervous and pale and had a bad complexion. That between 1921 and 1928 he worked not more than half the time. That he tried lots of times to work and couldn't. (Ts. 54). That he was at home sick in bed close to 18 months. He was in bed lots of times. He took medicine and vomited blood and even though he was not in a spell, he would be so he couldn't hardly stand. He would shake so. He walked like an old man and seemed to be lame. (Ts. 55).

His employer, C. A. Dunn, knew him from 1923 to 1927 and Omey E. Dyer always had a limp and leaned over side-ways. That he was never in good health and complained of his stomach. (Ts. 57). His face was drawn and he sometimes looked like a corpse. He never could stand much physical work. He wasn't on the work all the time, but his partner was, and it was on account

of his partner that the contract was kept up. (Ts. 58). He became tired easily upon exertion and couldn't stand but just a little work. (Ts. 58). He was off the job quite often, he was always sick. He kept growing gradually worse. He worked about half the time, possibly a little more or less. (Ts. 58). Many, many times he was forced to leave the job and go home sick. He was continually complaining of his back and side. The fact that John A. Gardner was Omey Dyer's brother-in-law had a lot to do with his being a partner. He was never entirely holding his end up. (Ts. 60).

In 1923 Omey E. Dyer consulted a Dr. Lucas at Hornbrook, Oregon, and then went to Portland, Oregon, to some doctors after that. (Ts. 40).

That Omey E. Dyer was under the care of Dr. Warren Coe Hunt from February 20, 1926 on for several months. That he was very nervous, had a general nervous debility. That he was pale, anemic, and weak, and was suffering from chronic indigestion and hyperacidity and extensive intestinal adhesions. (Ts. 64). That he had a condition of bowel stasis induced by the adhesions. (Ts. 66). That he was able to work continuously very little of the time owing to his weakness and general debility. He was highly nervous, restless, sleepless and could stand no physical exertion. (Ts. 66). That his stooping was caused by debility, weakness, pain in his back and abdomen and a general condition of exhaustion. That he was undernourished, and at that time he was not capable of any sustained effort either mental or physical because of his

general physical weakness as evidenced by anemia, a rapid, weak pulse. (Ts. 67). That while his condition improved somewhat, it was not sufficient to permit his return to useful work. (Ts. 67).

Omey E. Dyer grew gradually worse and worse and his brother-in-law dissolved the partnership because Omey Dyer couldn't longer go on. (Ts. 60). He remained in the partnership until 1927 when he finally had to quit. (Ts. 56). After the dissolution of the partnership in 1927, Omey E. Dyer didn't do anything. He wasn't able to do anything. His father had a little place at Blackfoot, so he just went there to live and stayed with his family. He was in the hospital in Boise from seven to nine months before his death on May 1, 1929.

After the dissolution of the partnership between himself and his brother-in-law, Omey Dyer remained in his father's home at Blackfoot about a year and four months before he went to the Veterans' Hospital in the fall of 1928. During that period he was sick, he was very drawn and stooped. Sometimes he would walk with a cane. He always complained of his stomach. (Ts. 49). At that time he was weak, short of breath after he walked two or three hundred yards and had to sit down and rest. (Ts. 39). At this time he tried to milk and couldn't. (Ts. 49). He was exactly as when he first came back from the army, only more serious. He tried to work, assisting loading hay, and he could not do it. (Ts. 52-53). He continued to have sores around his mouth and vomited. (Ts. 53). During 1927 and 1928 until he

went to the Veterans' Hospital where he died, Omey Dyer was again attended by Dr. Hampton, and that he was totally and permanently disabled, in the Doctor's opinion, during that time for the same condition that the Doctor had found in 1919. (Ts. 82-83). Omey E. Dyer died May 1, 1929. (Ts. 26).

We do not believe that the above narration of facts would leave any doubt in the mind of any impartial tribunal—whether it be a jury, trial judge, or appellate court—that Omey E. Dyer was totally and permanently disabled within the definition used in war risk insurance cases from the time that he returned from France and was sent to the hospital at Salt Lake in February 1919 until his death. And we believe that the facts presented make a much stronger case than that of *Lesher v. United States, supra,* wherein this Court said:

> "The Court does not weigh the evidence but considers whether there is any or sufficient evidence to sustain a verdict. (See *Ford v. U. S.,* 44 Fed. (2d) 754). And in war risk cases the most favorable construction should be given the evidence that is produced (*Ford v. U. S. supra*). The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced a verdict can be sustained, not weigh the evidence. If there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict."

—— Fed. (2d) ———.

It was further said by this Court in the Lesher case, even though the veteran had been on a payroll continuously from September 1920 until December 1922:

> "There is, however, a continuity of conditions related by the witness prior to his discharge by persons who were in close contact with him, including his captain and 'buddies', who, by reason of position or employment, were peculiarly situated to observe him. And this condition continued long past his earning period. He was carried on the payroll, but 'that does not signify he worked. * * * The other boys took care of his work.' The testimony of the specialist predicated on disclosed conditions, including medical testimony of the earliest examination, tends to an illucidation of the disability, and that was for the jury's consideration."

(*Lesher v. United States of America*).

We consider this a stronger case in plaintiff's favor on the facts than either the case of *United States v. Burke,* 50 Fed. (2d) 653, or *United States v. Lawson,* 50 Fed. (2d) 646, for the reason that in this case there is no evidence offered by the defendant to dispute the testimony of plaintiff's witnesses, and in both the Burke and the Lawson cases the veterans were yet alive, whereas in this case the veteran was dead. And it is stronger than the case of *United States v. Gower,* 50 Fed. (2d) 370, decided by the Tenth Circuit Court of Appeals, where a verdict was sustained even though plaintiff's doctor had refused to testify that the plaintiff was totally and permanently disabled. We cannot reconcile the direction of the verdict in this case by the trial judge with the principles of law laid down by this court in cases too numerous to mention. These facts that we have recounted are undisputed, and we submit that it is impossible in the face of this record to explain the trial judge's decision that

> "There is no evidence, as I view it, at all on which to predicate a verdict of the jury or a decree of this court."

and that this ruling by the trial judge shows either that he had a misconception of what the testimony was, or he had forgotten material parts of it, or had a misconception of the law applicable to the situation, and that his statement is without any foundation, much less being in accord with statements made by this court to this effect:

> "Under the Seventh Amendment to the Constitution, a jury trial is guaranteed in a civil action."

United States v. Lesher, supra.

> "From a consideration of the testimony, both lay and medical, we cannot say there was no substantial evidence to sustain the findings and conclusions of the trial court."

U. S. v. Scarborough, 57 Fed. (2d) 137.

> "The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge. It is whether the evidence to support a directed verdict as requested was so conclusive that the trial court, in the exercise of a sound judicial discretion, should not sustain a verdict for the opposing party."

Sorvik v. U. S., 52 Fed. (2d) 406.

> "And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act * * * which the courts have repeatedly held should be liberally construed in favor of the veterans."

Sorvik v. U. S. 52 Fed. (2d) 406.

> "And the right to a jury trial is guaranteed by the Constitution and it is not to be denied except in a clear case."

U. S. v. Burke, 50 Fed. (2d) 653.

> "On a motion for a directed verdict, the Court may not weigh the evidence, and if there is substantial evidence, both for the plaintiff and the defendant, it is for the jury to determine what facts are established, even if their verdict be against the decided preponderance of the evidence."

U. S. v. Burke, 50 Fed. (2d) 653.

In a war risk case, where the trial judge had directed a verdict against the plaintiffs, Judge Kenyon speaking for the Eighth Circuit, said:

> "As the court directed a verdict against plaintiffs they are entitled to have the evidence and inferences therefrom most strongly construed in their favor."

McNally v. United States (C. C. A. 8), 52 Fed. (2d) 440.

We submit that it is not necessary for the plaintiffs in this case, "to have the evidence and the inferences therefrom most strongly construed in their favor" in order to justify a reversal in this case. The evidence is undisputed that Omey E. Dyer was a war victim and was never able to work continuously after his return from the war.

B.

WHERE A VETERAN WORKS AND SUCH WORK IS INJURIOUS TO HIM, HE IS NOT BARRED FROM RECOVERING UPON HIS WAR RISK INSURANCE.

The evidence is undisputed that Omey E. Dyer never should have done any work after his discharge from the Army.

Dr. J. O. Hampton testified without any contradiction that the efforts of Omey E. Dyer to work made his condition worse. "Any mental or physical work of any kind would aggravate the condition." (Ts. 83). That even walking or moving around would bring on the vomiting and pain. (Ts. 83). "I didn't think he should work at all." (Ts. 89). That he knew Omey E. Dyer was working some of the time "and I tried to keep him from it." (Ts. 86).

This Court speaking through the revered Judge Dietrich in the Sligh case said:

> "Aside from the consideration that the testimony tended to show that the employer was moved by sentiment and sympathy, fairly construed, the policy is to be understood as meaning not present ability in an absolute, but a capacity that may be legitimately exercised; that is, without serious peril to the life or health of the insured. * * * Had appellee put aside concern for the immediate necessities of his family, and yielding to the advice of a conservative physician, wholly refrained from work, it may be doubted whether any question would have been rais-

> ed of his right to receive the insurance. But manifestly his 'ability' in a legal sense would be the same in one case as in the other."

U. S. v. Sligh, 31 Fed. (2d) 735.

There is no evidence in this case that Omey E. Dyer ever worked continuously, and as a matter of fact, the evidence is just to the contrary. And certainly, in view of Dr. Hampton's testimony, the holding of this Court in the Meserve case is applicable, wherein it said:

> "The question is not what the railroad company's payroll shows; it is what was the physical condition of the insured at that time. The record facts have no mysterious convincing force which forecloses their being explained and ameliorated by the proof of attendant and surrounding circumstances and conditions."

U. S. v. Meserve, 44 Fed. (2d) 549.

And the Circuit Court of Appeals for the Fifth Circuit in *United States v. Acker* held:

> "For a disability to be total within the meaning of the above referred to provision, it is not necessary that the insured's condition be such as to render it impossible for him to engage in any substantially gainful occupation. It is enough that his condition be such as to render him unable, in the exercise of ordinary case and prudence, to engage continuously in any substantially gainful employment. Appellee's disability was not kept from being total by his intermittent business activities, if, without the exercise of ordinary care or prudence, they were engaged in at the risk of substantially aggravating the ailment with which he was afflicted."

U. S. v. Acker, 35 Fed. (2d) 646.

We believe that the Acker case is directly in point here, and that Omey E. Dyer, under the evidence in this case, was not exercising ordinary care and prudence when he attempted to do any work, and had the matter gone to the jury, the jury might well have found, under the evidence, that it was his efforts to work that made his condition grow increasingly worse and that lead to his death.

In the Lawson case, decided by this Court, there was a much longer work record than appears in this case, but the circumstances under which the work was performed were similar to the conditions existing in the case at bar, and in the Lawson case this Court said:

> "It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances when they should not work at all. When they do that, they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein convinces us that the plaintiff worked when he was physically unable to do so, and that, but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."

U. S. v. Lawson, 50 Fed. (2d) 646.

And in the Lawson case, *supra,* this Court cited with approval the decision of the Fourth Circuit Court of Appeals in the case of *Carter v. U. S.,* 49 Fed. (2d) 221, wherein it was said:

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that the one who followed the advice of his physician refrains from such work, and lives is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a determination upon the facts in each case whether the man was able to continuously pursue a substantially gainful occupation."

Carter v. U. S., 49 Fed. (2d) 221.

In this case Omey E. Dyer worked and died. His closely associated partner from the year 1919 to 1927, Mr. Gardner, testified in regard to Mr. Omey E. Dyer's physical condition and said:

> "If it had been me, I would have filed a claim (against the government—compensation or payments from the government) and not tried to work." (Ts. 40).

This Court cited with approval the decision of the Circuit Court of Appeals for the First Circuit in *United States v. Godfrey*:

> "The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. (Citing cases). To hold him remediless because he tried manfully to earn a living for his family and himself, instead of yielding to

> justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."

U. S. v. Godfrey, 47 Fed. (2d) 126.

See also *U. S. v. Stewart,* 58 Fed. (2d) 520.

It is quite clear that the appellants were entitled to have this case submitted to the jury.

SPECIFICATION NO. 2

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE WITNESSES, BEULAH E. GARDNER, JOHN A. GARDNER, A. T. SPRINGER AND CHARLES E. DYER TO ANSWER QUESTIONS AS TO THE PHYSICAL APPEARANCE AND CONDITION OF OMEY E. DYER.

PROPOSITION OF LAW NO. 2

IN A CASE INVOLVING HEALTH, NON-EXPERT WITNESSES WHO HAVE HAD OPPORTUNITY TO OBSERVE, ARE PERMITTED TO GIVE SHORT HAND DESCRIPTIONS OF PHYSICAL APPEARANCE AND CONDITION.

Under this heading we desire to discuss the sixth, seventh, fourth and fifth assignments in the above order. We believe that all these can be discussed under this heading.

Beulah E. Gardner testified that she was Omey E. Dyer's sister-in-law. That she knew him quite well. That he was nervous and pale and had a bad complexion; that

he had lost weight; that he appeared to be exhausted. This witness was asked, "Did he appear to be a sick man or a well man?" to which it was objected that the question was leading and called for a conclusion, and the court sustained the objection (Ts. 54).

John E. Gardner testified that he had been acquainted with Omey E. Dyer since 1900 and was acquainted with him from that time up to the time of his death (Ts. 34-35). This witness was asked, "What was his color, was it healthful or otherwise, after he got out of the army?" to which an objection was made that it called for a conclusion and the court sustained the objection (Ts. 36).

The court also on motion struck from the testimony of Omey Dyer's father the statement that "He wasn't able to go on" as a conclusion (Ts. 27-28).

The court also struck out of the testimony of the witness, A. T. Springer, "And he looked like a sick man" on the ground that it was a conclusion (Ts. 30).

In *United States v. Woltman,* the Court of Appeals for the District of Columbia had under consideration a war risk case in which non-medical witnesses testified that the plaintiff did not have the ability to follow a gainful occupation and in regard to that testimony the court said:

> "It is always proper to permit a non-professional witness who has had an opportunity to observe a sick or injured person to testify with respect to whether such a person is helpless or unable to work. The value of the opinion depends, of course, upon the intelligence of the witness and his opportunity to know

of the condition as to which he testifies and the ordinary effect of such a condition. In this case the groundwork was sufficiently laid and we think the evidence was properly received."

U. S. v. Woltman, decided February 29, 1932, by the Court of Appeals, District of Columbia, —Fed. (2d) ———.

Although it is a general rule that a lay witness may not testify as to his opinion on a subject or to give his conclusions there are nevertheless certain exceptions as particularly set forth in the case of *Baltimore & Ohio Railroad Company v. Rambo,* 59 Fed. 75:

". . . On the trial, the chief issue of fact was the extent of the plaintiff's injuries. It was contended on his behalf that he was suffering from paralysis of his left leg and the muscles of his back, so as to permanently disable him, while the defendant company maintained that he was not suffering from paralysis, but was feigning disability for the purpose of increasing the amount of his recovery. . . . . ."

In answer to certain questions addressed to lay witnesses concerning what they saw and their opinion as to his condition, the following rule was made:

"It is objected also that some of the above statements are mere matter of opinion and conclusions of the witness from facts which he observed. This is true, but it does not render the statements incompetent. Where the statement of a witness is an inference from many minor details which it would be impossible for him to present in the form of a picture to the jury except by the statement of his inference or opinion, that opinion is generally compe-

> tent. *Parker v. Steamboat Co.,* 109 Mass. 449. In *Village of Shelvy v. Clagett,* 46 Ohio St. 549, 22 N. E. 407, it was held that a nonprofessional witness, who had had opportunities to observe a sick or injured person, might give in evidence his opinion of such person in respect of his being weak and helpless or not, and of the degree of suffering which he endured, provided such opinion was founded on his own observation of the person to whom his evidence related, and was limited to the time that the person was under his observation."

In the case of *Parker et al. v. Elgin,* 5 Fed. (2d) 562, the Circuit Court of Appeals stated:

> ". . . Opinion evidence may be given by a non-expert witness in many matters where it is impossible to reproduce or describe in words every detail upon which the opinion of the witness is predicated. . . . ."

The United States Supreme Court in the case of *Connecticut Mutual Life Insurance Company v. Lathrop,* 111 U. S. 612, wherein the issue was as to the sanity of the insured immediately preceding the time of his death by suicide and wherein witnesses were asked to state the impression made upon them of what they saw of the insured's condition and the defendant objected to the question as incompetent, which objection was overruled, stated:

> "It is contended, in behalf of plaintiff in error, that the impressions and opinions of these nonprofessional witnesses as to the mental condition of the insured, although accompanied by a statement of the grounds upon which they rested, were incompetent as evidence of the fact of insanity. This

question was substantially presented in *Ins. Co. v. Rodel,* 95 U. S. 232, which was an action upon a life policy containing a clause of forfeiture in case the insured died by his own hand. The issue was as to his sanity at the time of the act of self-destruction. Witnesses acquainted with him described his conduct and appearance at or about and shortly before his death. They testified as to how he looked and acted. One said that he 'looked like he was insane;' another, that his impression was that the insured 'was not in his right mind.' In that case the court said, that 'Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony and expressed in an inartificial way the impressions which are usually made by insane persons upon people of ordinary understanding.'

"The general rule undoubtedly is, that witnesses are restricted to proof of facts within their personal knowledge and may not express their opinion or judgment as to matters which the jury or the court are required to determine, or which must constitute elements in such determination. To this rule there is a well established exception in the case of witnesses having special knowledge or skill in the business, art or science, the principles of which are involved in the issue to be tried. Thus, the opinions of medical men are admissable in evidence as to the sanity or insanity of a person at a particular time, because they are supposed to have become, by study and experience, familiar with the symptoms of mental disease and, therefore, qualified to assist the court or jury in reaching a correct conclusion. And such opinions of medical experts may be based as well upon a hypothetical case disclosed by the testimony of others. But are there no other exceptions to the general rule to which we have referred?

". . . . There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation; matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness, predicated upon facts detailed by others, is incompetent as evidence upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value; because the natural and ordinary operations of the human intellect and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by everyone of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached.

". . . In form, it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner and motions of another person, of which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. . . ."

Connecticut Mutual Life Insurance Company v. Lathrop, 111 U. S. 612.

Same law:

Mutual Life Insurance Company of New York v. Leubrie, 71 Fed. 843.

In the case of *Kiesel & Co. v. Sun Insurance Office of London,* 88 Fed. 243, the court stated:

". . . One witness may be able to make so graphic a word picture of a scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another, who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion he drew from them. The trial court sees and hears each witness, and in doubtful cases is far better qualified than the court of appeals to determine whether a witness should be confined to the facts or should be allowed to state his conclusions. . . ."

In *Firemen's Insurance Company of Baltimore v. J. H. Mohlman Co.,* 91 Fed. 85, the Circuit Court stated that it is not a valid objection to opinion evidence that the opinion covers the whole ground of the inquiry which the jury are to decide, if the case is one to be fully resolved by opinion evidence.

See also:

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1252, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Note 17, page 2306.

Jones, Commentaries on Evidence, Second Edition, Vol. 3, Section 1267, page 2335.

Greenleaf on Evidence, Vol. 1, 16th Edition, page 524.

Connecticut Mutual Life Insurance Company v. Lathrop, 111 U. S. 612; 28 L. Ed. 538-9.

Turner v. American Security & Trust Company, 213 U. S. 257; 53 L. Ed. 788.

Reininghaus v. Merchants' Life Association (Iowa) 89 N. W. 1113.

Looney v. Parker, (Iowa) 230 N. W. 570.

Lilly v. Kansas City Rys. Co. (Mo. App.) 209 S. W. 969.

Benson v. Smith (Mo. App.) 38 S. W. (2d) 749.

San Antonio Traction Co. v. Flory (Tex. Civ. App.) 100 S. W. 200.

Missouri, K. & T. Ry. Co. v. Gilcrease (Tex. Civ. App.) 187 S. W. 714.

Mielke v. Dobrydnio (Mass.) 138 N. E. 561.

Tyler v. Moore (Ore.), 226 Pac. 443.

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